Supreme Court, U.S.
FILED

No. 10-17

JUN 29 2010
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In the
Supreme Court of the United States

Benoit Brookens,

Petitioner,

v.

Hilda L. Solis,
Secretary of Labor,

Respondent.

On Petition for a Writ of Certiorari
To the United Stated Court of Appeals
For the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI
To the District of Columbia Circuit

Benoit Brookens
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Petitioner

QUESTIONS PRESENTED

Whether the U.S. Court of Appeals for the District of Columbia properly interpreted FRAP 34 (a) (2), contrary to the view of the other circuits, that it is not required to review the record in summary disposition of cases under Title VII the Civil Rights Acts of 1964 and 1991?

Whether a Title VII plaintiff, within the D.C. Circuit, is not entitled to a trial, de novo, in the U.S. District Court and an opportunity for full discovery as required by the U.S. Supreme Court in Bell Atlantic Corp. v. Twombly; Celotex Corp. v. Catrett; and Anderson v. Liberty Lobby, while that right to full discovery is still available in Title VII actions in the other federal circuits?

Whether the D.C. circuit court's holding that Section 1981 of the Civil Rights Act 1991 does not apply to federal employees, conflicts with the Congressional purpose for enhanced penalties for "intentional discrimination" and workplace harassment?

Whether the D.C. Circuit errered by failing to apply a de novo standard of view for each of the issues raised by the plaintiff, including the right to a de novo review, in the District Court, and the right to full discovery, to prove "intentional" discrimination meriting enhance penalties as provided by Title VII of the Civil Rights Act of 1991?

Whether the District Court abused its discretion in denying Plaintiff's Motion to Stay Ruling on Defendants Motion for Summary Judgment Pending Plaintiff's Request for Discovery?

PARTIES TO THE PROCEEDING

Benoit Brookens, a former international economist at the U.S. Department of Labor, is the plaintiff in this Title VII action under the Civil Rights Act of 1964, as amended.

Hilda Solis, the successor to Elaine Chao as the Secretary of Labor, is the defendant.

TABLE OF CONTENTS

Page

Questions Presented i
Partied to the Proceedings.....ii
Table of Contents.....iii
Table of Authorities.....iv
Opinion and Judgment Below.....1
Statement of Jurisdiction.....1
Statutory and Constitutional
Provisions Involved.....1
Statement of the Case.....2
The Record Below.....4
Reasons for Granting the Petition.....4

Application of the D.C. Circuit interpretation, would summarily dispose of Title VII actions under the Civil Rights Act of 1991 without trial court record, hearing, nor discovery contrary to the practice of the other
circuits.....4

There is a conflict among the circuits on Application of Section 1981 to the Federal Government.....3

Appendix.....
Appendix
Table of Contents A-1

March 31, 2010 Order of
The Court of Appeals for the District
of Columbia Circuit, En Banc.....A-2

December 9, 2009 Order of the Court of
Appeals (panel) for the District of Columbia.....A-3

Appellants List of Issues to be Raised
In the Appeal.....A-

May 21, 2009 Order and Opinion of the District
Court.....A-

Applicable Constitutional Provisions,
Statutes, Rules
Civil Rights Act of 1964 .....A-19
Section 1981 .....A-19
Court of Appeals Jurisdiction A-20

Pleadings and Evidence Below:

Relevant Docket Entries.....A-21

Plaintiffs' Exhibit 4 .....A-23

TABLE OF AUTHORITIES

Cases Page

Federal

Anderson v. Liberty Lobby, Inc.,477 U.S. 242,
106 S. Ct. 2514, 91 L.Ed.2d 202
(1986).....1,9

Bell Atlantic v. Twombly,
550 U.S. 544, 570 (2007).....i,2,7

Burke v. Gould, Chairman, National
Labor Relations Board, 286 F. 3d 513,
(D.C. Circuit 2002) 10

Celotex Corp. v. Catrett, 477 317,
106 S.Ct. 2548, 2552-53, 91 L.Ed.2d 202(1986):..i,9

City of Milwaukee v. Saxbe, 546 F.2d 693,
(1976).....10

First Chicago Int'l v. United Exch. Co.,
836 F.2d 1375,(1380)(D.C. Cir 1988) 8,9

Jones v. Bernanke, 557 F. 3d 670,
678 (D.C. Cir. 2009).....8

Gaines v. Canada, 305 US 337,
(S.C. Nov. 9, 1938), ...5

State

Gaines v. Canada , 342, Mo. 121,
113 S.W.2d 783, (Rev.)..... 5

Constitutional Provision

U.S. Const. Amend. XIV (Equal Protection
Clause).....passim

Statutes

28 USC 1291, Court of Appeals Jurisdiction.....1,5

Title VII, Civil Rights Act on 1964, ...4,6,10

Section 1981, Civil Rights Act of 1991, ...10

Rule

FRAP 34.....5

FRCP 12(b).....7

FRCP 56.....10

Petition for a Writ of Certiorari

Petitioner respectfully prays that a writ of certiorari issue to review the final judgment of the United States Court of Appeals for the District of Columbia Circuit.

Opinion and Judgment Below

The District Court's opinion is reported as Brookens v. Solis, 635 F. Supp. 2d 1 (D.D.C. 2009) and reprinted in Appendix A-5. The court of Appeals unpublished order is not officially reported and reprinted in Petitioner's Appendix, A-3.

Statement of Jurisdiction

The District Court has jurisdiction under 28 U.S.C. Art. 1331. The Court of Appeals issued its judgment on July 13, 2009. This Court has jurisdiction under 28 U.S.C. Art. 1254(1).

Statutory and Constitutional Provisions Involved

Relevant provision of Title VII of the Civil Rights Act of 1964 is provided in the Appendix at A-18.

Section 1981, as amended by the Civil Rights Act of 1991, is provided in the Appendix at A-18.

28 U.S.C. 1291 provides for de novo judicial review in the U.S. Court of Appeals. The section is provided in the Appendix at A-19.

Statement of the Case

Congress, via the Civil Rights Act of 1991, amended the Civil Rights act of 1964 to provide enhanced penalties for violations of the statute for acts which were proven before a jury to constitute "intentional" discrimination.

Pursuant to this statute, Benoit Brookens filed a required civil action, to exhaust his judicial remedies, for alleged intentional discrimination in the award of promotions in vacancies, promotions through desk audits, and details to training assignments leading to promotions.

Mr. Brookens' complaint cited, the reasons the agency provided for its actions—and challenged their factual veracity. In lieu of an Answer to the Complaint, DOL filed a motion to Dismiss and in the Alternative for Summary Judgment under FRCP 12(b)(6).

The district court granted summary judgment ruling that in view of the agency's cited reasons for its actions, it need not provide a de novo hearing to the plaintiff, complete the burden of proof shifting analysis provided under McDonnell Douglass, nor provide the plaintiff discover pursuant to Bell Atlantic Corp. v. Twombley,;

The D.C. Circuit, on the Agency's motion for summary affirmance, without any review of the record, affirmed. The D.C. Circuit, en banc, affirmed the panel decision, from which the former employee petition for certiorari.

The district court did not require the defendant to file an Answer to the Complaint. A period for discovery was not provided for by the district court which decided the agency's motion for summary judgment finding that the plaintiff failed to e.g. "failed to rebut the legitimate reasons defendant has proffered for denial of the details and the December 2007 desk audit." The court citied Mr. Schoepfle's statement that there was "no detail opportunity" (Decision, p. 13). The record, to the contrary, to be decided by the jury is whether a detail opportunity, in this instance was available to "other employees", but "not to Mr. Brookens." With these, and all the identified issues in the Plaintiff's Complaint, the district court found in favor of summary judgment in favor of the defendant agency.

The court ruled that it "granted the defendant's motion to dismiss complaint, or in the alternative for summary judgment and will deny plaintiff's motion to stay."

Mr. Brookens filed an appeal, and prior to receipt of the record, the pleadings, or any documentary evidence, in the case, the D.C. Circuit granted the U.S. Department of Labor's motion to Summarily Affirm the decision of the District Court. A panel of the Court of Appeals ruled that "the merits of the parties' positions are so clear as to warrant

summary action. (Decision, December 9, 2009) (Appendix, A-5).

The Court of Appeal, en banc, on July 13, 2009, affirmed. (Appendix, A-2)

The Record Below

The Circuit's record does not show any Answer to the Complaint. The Circuit record does not show and discovery implemented by the parties, and the District Court relying on the record and the MSPB, when the statute provides for a de novo review in the U.S. District Court. The Circuit decision does not reflect, any de novo review of and of the findings the circuit used to affirm the finding of the district court, in contravention of the required review delegate to the Circuit as provided by the authorizing statute, and Congressional intentions.

Reasons for Granting the Petition

The D.C. Circuit's "Summary Affirmance" procedures, applied to civil actions Under Title VII, of the Civil Rights Act of 1964, as amended, unlike the other circuits, the D.C. Circuit does not provide for a decision, upon a review of the record which is required to include a de novo review in the district court and an opportunity for full discovery by the parties in the trial court.

The D.C. Circuit's standard for summary disposition creates a grossly divergent and lenient criteria for disposition of civil rights, Title VII

discrimination and reprisal actions than that applied by the other circuits.

Parties, in Title VII actions of the Civil Rights act of 1964, are provided, by statute, a de novo hearing, in discrimination cases before the U.S. District Court. The Court of Appeals, upon petition, by either party, of summary judgment dispositions, takes a de novo review of the district court's decision, 28 U.S.C. 1291, and the criteria for the summary judgment in favor of a party. Failure to properly apply the judicial standard in a timely fashion, may relegate the relieve and benefits beyond the usefulness for the plaintiff[1].

The D.C. Circuit's Interpretations of FRAP 34, Oral Argument, conflicts with the reading of the other federal circuits, to not require a record for review.

FRAP 34(a)(2) Standards, provides the following:

Oral argument must be allowed in every case unless a panel of three judges who have examined the briefs and record unanimously agrees that oral argument in unnecessary for any of the following reasons:

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[1] Gaines v. Canada, 305 US 337, (S.C. Nov. 9, 1938), "A Quiet Hero of Civil Rights History, Vanished in 1939—NYTimes.com", "A Supreme Triumph, Then Into the Shadows," by David Stout, July 12, 2009, www.nytimes.com/2009/07/09us/12gaines.html]" In 2006, Mr. Gaines was posthumously admitted to the University of Missouri Law School and the Missouri Bar. The U.S. Supreme Court granted review of the Missouri Supreme Court decision which held that Mr. Gaines failed to exhaust his administrative remedies.

(A) the appeal is frivolous;
(B) the dispositive issues or issues has been authoritatively decided; or
(C) the facts and legal arguments are adequately presented in the briefs and record and the decisional would not be significantly aided by oral argument.

Within the past ten (10)[2] years, none of the other Federal Circuit Courts of Appeals have applied this rule to any Title VII cases under the Civil Rights Act of 1964. When the other circuits, except of the D.C. circuit applied FRAP 34 to dispense with oral argument, the parties were still provided the opportunity to provide briefs on the issues on appeal and an opportunity to present relevant portions of the trial court record.

The D.C. Circuit's view of FRAP 34(a(2) however, in this case, failed to provide for a review of any record, or provide a brief on the issues in contention.

The issues, identified in this petition, were presented to the court of appeals. However, that court's decisions, by the panel, nor en banc, identifies or cites any of the arguments—or the evidence, in its decisions, for review by this court.

The review of those issues, thusly, is now requested before this court on certiorari.

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[2] The LexisOne Community Service coverage is comprehensive for this period.

The Court of Appeals, without a cursory examination of the record, as reflected in its decision, A-3, summarily affirmed the decision of the district court, A-5—without any regard to the issues the petitioner desired considered for review. The District Court, Opinion p. 4, held that the plaintiff did not raise the issue of race discrimination before the Merit System's Protection Board, (MSPB) (Decision, p. 4, Footnote 6) when the record provides otherwise.

The District Court, (Decision, p. 5) citied that in assessing Defendant's motion to dismiss pursuant FRCP 12(b)(6) dismissal for failure to state a claim upon which relief may be granted—by review of the face of the pleadings—and whether enough facts have been plead to provide relief. Bell Atlantic v. Twombly, 550 U.S. 544, 570 (2007). The allegations, at that point are presumed true.

The trial court then relied of the plaintiff's complaint, which outlined the defendant's stated reasons for its actions. The District Court (Decision, p. 9) then applied the alleged facts in the plaintiff's Complaint to find that "summary judgment should be entered because plaintiff have failed to rebut defendant's legitimate, non-discriminatory reasons for these denials." The court then summarized that the applicable standard is whether the "plaintiff has produced sufficient evidence for a reasonable jury to find that the employer's asserted non-discriminatory reason was not the actual reason and that the employer intentionally discriminated against [the plaintiff]. Jones v. Bernanke, 557 F. 3d 670, 678 (D.C.

Cir. 2009) (applying same principal to retaliation claims).

Generally, the evidence, documents, and witnesses, generally are in the hands of the defendant. That recognition was provided by the district court.

"While summary judgment ordinarily 'is proper only after the plaintiff has been given adequate time for discovery," the district court wrote, [decision, Brookens, I, p. 10] "First Chicago Int'l v. United Exch. Co., 836 F.2d 1375,(1380)(D.C. Cir 1988) the information Brookens seeks through discovery is simply not necessary to decide this case."

Brookens provided to the district court, exhibit 4, [A-22] for example, an action by another federal agency, "The Executive Office of the President," certifying Mr. Brookens as eligible for a GS-14 vacancy, consistent with the relief requested in the complaint from DOL. This evidence—previously available to the trial court record-- was not reviewed nor considered by the D.C. Circuit.

In the pending arbitration regarding whether the Labor Department took retaliatory action againt Mr. Brookens, Mr. Schoepfle's testimony contradicts statements filed before the District Court, Brookens, II, as to the identify of the selecting official for the challenged vacancies.

The Labor Department provided witeness statements relied upon by the District Court, Mr. Brookens did not have the opportunity—as is the case

post discovery--to have challenged their veracity or accuracy.

FRCP 12(b) provides for an Answer to the complaint, providing for "every defense, in law or fact." The Labor Department--did not file and answer to the Complaint. The agency was not required to respond to each of the allegation of the complaint, via an admission or denial, and to provide any other defenses it had to Mr. Brookens civil action by way of rule 12(b) subparagraphs, 1-6.

The Court of Appeals—did not consider Mr. Brookens' formulation of this or any other of the issues Mr. Brookens raised in the appeal. Whether the appellant—is represented (Brookens, I)—or unrepresented—at any stage of the administrative or judicial process, the petitioner must be entitled to present to the appeals court his formulation of the factual and legal errors in any of the proceeding's below.

It is the law that "reasonable opportunity" includes the opportunity to 'pursue reasonable discovery." See e.g. Celotex Corp. v. Catrett, 477 317, 106 S.Ct. 2548, 2552-53, 91 L.Ed.2d 202(1986); Anderson v. Liberty Lobby, Inc.,477 U.S. 242, 106 S. Ct. 2514, 91 L.Ed.2d 202 (1986) (plaintiff must have "a full opportunity to conduct discovery"); In First Chicago International, relied upon by the district court, (Brookens, I) we find an enunciation of the principals required of all U.S. courts:

> More fundamentally, under Federal Rules of Civil Procedure, when a Rule 12(b)(6)

motion to dismiss is converted into a motion for summary judgment, all parties must be given a "reasonable opportunity" to present all material pertinent to such a motion by Rule 56.

Amended Section 1981 Provides Enhanced Federal Employee Protections for "Intentional Discrimination."

Finally, the D.C. circuit decision, on the application of 42 U.S.C. Art. 1981, is contrary to Burke v. Gould, Chairman, National Labor Relations Board, 286 F. 3d 513, (D.C. Circuit 2002), The City of Milwaukee v. Saxbe, 546 F.2d 693, (1976), and amendment for "intentional discrimination and unlawful harassment in the workplace" and to "conform statutory authority and provide guidelines for adjudication of disparate impact suits." to the Civil Rights Act of 1991, as passed by Congress.

For these reasons, the court is requested to grant certiorari for this petition, or in the alternative, the Court is requested to invite the Solicitor to respond to this Petition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Benoit Brookens, certify that a copy of the foregoing Petition for Certiorari and Appendix was served on the Solicitor General of the United States, Room 5614, Department of Justice, 950 Pennsylvania Ave, N.W., Washington, DC 20530-0001 and the Hilda L. Solis, Secretary of Labor, 200 Constitution Ave., NW, Washington, DC 20210 by deposit in the U.S. mail, postage first class, pre-paid this 29th day of June 2010.

_____

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